



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

October 18, 1996

Mr. Charles B. Cliett, Jr.  
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Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR96-1888

Dear Mr. Cliett:

On behalf of National Viator Representatives, Inc. ("NVR"), you ask us to reconsider Open Records Letter No. 96-1116 (1996). Your request for reconsideration was assigned ID# 101352.

The Texas Department of Insurance (the "department") received a request for information concerning viatical settlement rules or findings. The requested information is contained in several applications for certificates of registration as a viatical settlement company or broker. You claimed that request implicates the proprietary interests of the applicant companies. Thus, pursuant to section 552.305 of the Government Code, we notified the viatical companies of the request for information and of their opportunity to submit written comments explaining why the requested information should be excepted from disclosure. NVR did not respond. Consequently, we ruled that NVR's application is not excepted from required public disclosure. Open Records Letter No. 96-1116 (1996).

NVR has now submitted written comments to this office explaining why the portions of its application should be excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 does not, however, protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Thus, we need not address NVR's claim that portions of its application are excepted from public disclosure under section 552.104. On the other hand, section 552.110 is designed to protect the interests of third parties. Thus, NVR's section 552.110 claims, although raised subsequent to our ruling in Open Records Letter No. 96-1116 (1996), present us with compelling circumstances that require us to reconsider our ruling insofar as it requires the department to release NVR's application to the requestor. *See* Open Records Decision No. 552 (1990) at 1.

NVR claims that sections 17 and 20 of its application should be excepted from disclosure pursuant to section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. Restatement of Torts § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. Having considered NVR's arguments, we conclude that NVR has not established a *prima facie* case that sections 17 and 20 of its application contain trade secret information.

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

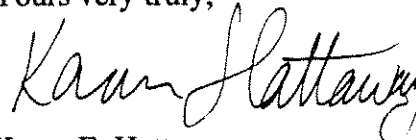
- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). NVR has not made the required showing to prove that releasing sections 17 and 20 of its application will cause it to suffer substantial competitive harm. Thus, we conclude that the commercial or financial information prong of section 552.110 does not except sections 17 and 20 of its application from disclosure. Because NVR has not demonstrated that any portion of its application is excepted from disclosure under section 552.110, the department must release NVR's application to the requestor in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

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Ref: ID# 101352

Enclosures: Submitted documents

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